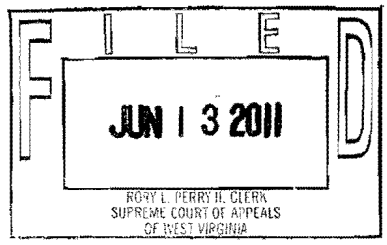
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0399



STATE OF WEST VIRGINIA,

Plaintiff Below,
Respondent,

v.

TIMOTHY MICHAEL WALDRON,

Defendant Below,
Petitioner.

RESPONSE TO PETITION FOR APPEAL

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I.

STATEMENT OF THE CASE

Timothy Michael Waldron (hereinafter "Petitioner" or "the Petitioner") appeals the August 17, 2010, order of the Wood County Circuit Court (Reed., J.), sentencing him to not less than one (1) nor more than five (5) years in the penitentiary upon his conviction by a Wood County petit jury on one count of Delivery of a Schedule I Controlled Substance, *i.e.* two ounces of marijuana, under West Virginia Code § 60A-4-401(a)(ii). (Trial Tr., 283, May 6, 2010.)

On September 18, 2009, a Wood County Grand Jury returned a single-count indictment charging the Petitioner with one count of Delivery of a Controlled Substance--marijuana. (App. 5.) (Case No. 09-F-206.) After a two-day trial, a Wood County petit jury convicted the Petitioner on the sole count of the indictment. The Petitioner filed a post-trial motion for a judgment of acquittal.

After denying Petitioner's post-trial motion, the trial court sentenced him, running his sentence consecutively to the sentence he was already serving on an unrelated crime. The Petitioner received 75 days credit for time served.

II.

SUMMARY OF ARGUMENT

The Petitioner posits the following assignments of error:

1. The Court erroneously relied on the reasoning and holding in *State v. Dillion*, 191 W. Va. 648, 447 S.E.2d 583 to allow the admission of the video and audio recordings of the alleged drug transaction without the testimony of the confidential informant, the only witness to the alleged drug transaction, at trial. Although *State v. Dillion* has not been overturned by this Court the decision is pre-*Crawford v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006) and begs a further analysis to determine the present constitutionality of its application. In allowing the audio and video recordings to be admitted without testimony by the confidential informant violated the Defendant's Sixth Amendment Constitutional Right to confront and cross examine all witnesses against him at trial.

2. The lower court erred by denying the Defendant's Motion for a Directed Verdict at the end of the State of West Virginia's case in chief as the evidence presented by the State of West Virginia clearly established overwhelming evidence of entrapment.

3. The lower court erred in refusing the Defendant's request for a jury instruction on entrapment when the Defendant offered some competent evidence of entrapment to require the prosecution to prove beyond a reasonable doubt that the Defendant was predisposed to commit the offense.

4. The lower court erred by allowing Task Force officers to make an in-court identification of the Defendant's voice on the audio recordings of the alleged controlled buy.

5. The lower court erred by admitting the drug evidence in this matter when the State of West Virginia did not establish a proper chain of custody as the confidential informant never testified that the marijuana admitted was the marijuana they received from the Defendant. The State offered no evidence that the marijuana admitted into evidence at trial ever came from the Defendant.

6. The lower court erred in finding the State of West Virginia had no duty to disclose the photographs and/or information used by the Parkersburg Narcotics Task Force to identify the Defendant under W. Va. Rules of Criminal Procedure Rule 16 and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

The Respondent concedes that there is no first hand testimony relating to the transfer of the money and the marijuana. This case is one in which this Court must use its common sense. Briefly stated, officers of the Parkersburg Narcotics Task Force arranged a controlled buy. The State proved that the CI met the Petitioner at a predesignated meeting place. Before driving to this place, officers working for the Task Force searched the CI's person and his car for drugs or any other kind of contraband. They found nothing. They then provided the CI with $300.00 in cash. The CI drove to a predesignated meeting place where he met the Petitioner. After briefly speaking with two other individuals who arrived at the same time, the Petitioner got into the front passenger seat of the CI's car. While in the CI's car, officers from the Task Force were staked out around the lot. At some point the Petitioner got out of the CI's car and drove away. The CI met the officers at another predesignated meeting place where he turned over approximately two ounces of a green, leafy substance packaged in a plastic bag.[1] The State confirmed that the substance was marijuana.

The Petitioner contends that the State failed to prove that he sold the CI the marijuana. This marijuana did not appear miraculously. The CI did not possess marijuana before meeting with the Petitioner. He met the Petitioner in order to purchase marijuana. After meeting with the Petitioner, and only the Petitioner, the CI possessed a bag of marijuana. The unfolding of events in this case

[1]One of the officers followed the CI from the place of purchase to the predesignated meeting spot. He did not see the CI stop, pick anyone up, or throw anything out the window.

had its own relentless logic. Only a person bound and determined to acquit the Petitioner could ignore the obvious and reasonable inferences presented by the facts of this case.

Nor did the State entrap the Petitioner. As the trial court found, although the controlled buy was initiated by the State, the defense failed to introduce any evidence that the Petitioner's criminal design was a product of the State's effort. Indeed, defense counsel did not raise this potential defense until after the State had rested. There is no evidence that the investigating officers picked the Petitioner at random, and then pressured or coerced him into selling the marijuana to the CI. The Petitioner merely rose to the bait. That does not constitute entrapment.

The Respondent will concede that the State's failure to produce the CI at trial is problematic. It rendered what should have been a direct evidence case into a circumstantial case.[2] Apart from the Petitioner, the CI was the only person with first-hand knowledge of the transaction. But this failure is not fatal to the State's case. The issue is not one of the Petitioner's right to confront the witnesses against him. The issue is whether the State produced sufficient evidence without the CI's testimony to prove all of the elements of the offense beyond a reasonable doubt. The record indicates that this trial was re-set several times, making it difficult to subpoena this witness. The State made every reasonable effort to locate the CI. The State had previously used the same CI on eight to twelve other controlled buys, and he had proven to be reliable in the past. (Trial Tr., 168, May 5, 2010.) Indeed, the State's failure to produce the CI worked to the Petitioner's benefit. Defense counsel effectively utilized the fact that the State did not call the CI as a witness both before the trial court and before the jury. (Trial Tr.,111, May 5, 2010; Trial Tr., 291, 296, 313, May 6, 2010.) In fact,

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[2]Counsel for the State noted this in his summation. (Trial Tr., 309, May 6, 2010.)

the State's failure to produce the CI became the theme of a very effective closing argument from the defense.

Petitioner's claim that the State's failure to call the CI as a witness violated his right to confront the witnesses against him is without merit. The CI's statements clearly were not admitted for the truth of the matter asserted. Nor is the Petitioner's subjective belief about the truth of the CI's statement relevant. This Court resolved this issue in Syl. pt. 4, *State v. Dillion*, 191 W. Va. 648, 447 S.E.2d 583 (1994). Although *Dillion* is *pre-Crawford v. Washington, Crawford* held that testimonial statements not introduced for the truth of the matter asserted do not run afoul of the confrontation clause. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Counsel for the Appellee states that oral argument is not necessary in this case. *See* W. Va. R. App. P. 18(a)(1).

IV.

STATEMENT OF FACTS

On May 4, 2009, the Petitioner sold almost two ounces of marijuana to a confidential informant (hereinafter "CI"or "the CI") working for the Parkersburg Violent Crime and Narcotics Task Force. The State charged him with a single count of delivery of a Schedule I controlled substance. Petitioner's two-day jury trial began on May 5, 2010.

On the first day of trial, the court convened a suppression hearing in response to Petitioner's pre-trial motion to suppress audio and video tapes recorded by a confidential informant (hereinafter

"CI"). The Task Force initiated the controlled buy after the CI told Officer Douglas Strum that the Petitioner was selling marijuana, and volunteered to conduct a controlled buy. (Trial Tr., 4-5, 7, May 5, 2010.) The transaction took place in the parking lot of a Wendy's fast-food restaurant. (Trial Tr., 7, May 5, 2010.)

Before making the buy, the investigating officers thoroughly searched the CI, his car, and all of the containers in his car. (Trial Tr., 6, May 5, 2010.) They also obtained a consent form allowing them to record the CI's conversations. (*Id.* at 16.) The officers then fitted the CI with both audio and video recording devices and provided him with $300.00 of buy money before sending him[3] to buy the drugs.[4] (*Id.* at 6.) The officers then positioned themselves around the Wendy's parking lot. Officer Strum parked across the street. (*Id.* at 7-8).

The Petitioner arrived by motorcycle, along with two other individuals who arrived by car. (*Id.*) Upon his arrival, the Petitioner briefly spoke with the two other individuals parked in a car in the lot. He did not enter their automobile. (*Id.* at 6.) He then got into the CI's car where he exchanged the money. (*Id.* at 8.) Petitioner's counsel objected to this testimony on competency grounds, claiming Officer Strum could not have seen this transaction from where he was parked. (*Id.*) The trial court overruled counsel's objections, ruling that the objection went to the weight of the evidence and that defense counsel could pursue their claim during cross-examination. (*Id.* at 9.) Officer Strum again testified that he believed that the transaction occurred in the CI's car. (*Id.*)

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[3]The CI was a male named Michael Forman. (Trial Tr., 7, 9, 14, May 5, 2010.)

[4]Parkersburg City Police Officer Douglas Strum testified that he was qualified to operate these devices, and that taken part in hundreds of controlled buys. (Trial Tr., 6-7, May 5, 2010.)

After he sold the CI the marijuana, the Petitioner got back on his motorcycle and drove off. The police did not follow him. (Trial Tr., 9, May 5, 2010.) Instead, the officers met up with the CI at a predesignated meeting place where they recovered the audio and video recording devices and the marijuana. (*Id.*)

Officer Douglas Strum testified that he had spoken with the CI "several times" before setting up this purchase, and was sufficiently familiar with his voice to identify it. (*Id.* at 9-10.) After listening to the audio tape, he opined that one of the recorded speakers was the CI. (*Id.* at 10.) The officer also testified that the CI got into his car alone, and drove to the Wendy's alone.

The transaction was recorded using a digital recorder with an internal memory. Officer Strum testified that he was qualified to run the recording equipment, and that the equipment was in good working order. (*Id.* at 11.) The resulting recording was eighteen minutes long. (*Id.* at 12.) The officer copied the recording onto a disk which he compared to the contemporaneous recordings to ensure that the information on the disk was accurate. (*Id.* at 13-14.)

The CI contacted Officer Strum 15 minutes before the hearing, presumably by phone, saying he was in Marietta, Ohio. (*Id.* at 16.) Prior to this, Officer Strum had contacted the CI by text message. (*Id.*) Officer Strum personally met with the CI in Vienna approximately two weeks before trial. Because there was no trial date The trial court had not set a trial date he did not serve the CI with a subpoena, nor did he obtain a home address. (*Id.* at 16-17.) Prior to the suppression hearing Officer Strum searched for the CI, using the addresses and phone numbers the CI had given him. He could not locate him. (*Id.* at 18, 36.) Immediately before the suppression hearing the CI phoned Officer Strum and told him that he had no intentions of appearing and would go to California to avoid having to testify. (*Id.* at 18.)

The trial court ruled that the consensual monitoring form signed by the CI, and the audio tape were admissible as "independent evidence of a crime." (Trial Tr., 114-16, May 5, 2010.)

Officer Strum was the State's first witness in its case-in-chief. (*Id.* at 122.) He became involved in the Petitioner's case when his CI told him that the Petitioner was selling marijuana, and that he would be willing to participate in a controlled buy. (*Id.* at 124.) On May 4, 2009, at approximately ten o'clock Officer Strum met his CI, searched his car and his person, and had him execute the necessary paperwork.[5] (*Id.* at 125-26, 129.) The officer then provided the CI with $300.00 with which to buy the marijuana, and attached a recording wire to his clothing. (*Id.* at 129, 131.) The CI got back into his car and drove to the Wendy's parking lot. He drove there alone. (*Id.* at 132.) Officer Strum followed his CI to the parking lot. He did not observe the CI stop, talk to anyone, throw anything out the window, or pick up anyone else while driving to the Wendy's. (*Id.* at 133.) Before the CI arrived, several other task force officers were already positioned around the lot, prepared to observe the transaction. (*Id.* at 134.) Shortly thereafter the Petitioner arrived at the parking lot, driving a motorcycle. (*Id.* at 135.) After speaking with two individuals in a car parked in the lot, the Petitioner got into the front passenger seat of the CI's car. (*Id.* at 137.) Because of the audio wire Officer Strum was able to listen to the conversations in the CI's car in real time. (*Id.* at 136-37.)

Based on prior experience, Officer Strum opined that one of the voices on the audio wire was his CI.[6] (*Id.* at 137.) The officer also heard a second voice. (*Id.* at 138.) As he had observed the

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[5]At some point prior to this the CI made a phone call from Officer Strum's car to someone named Tim who asked him to meet up at the Wendy's parking lot where the transaction occurred. (Trial Tr., 182, May 5, 2010.)

[6]The officer testified that he had spoken with his CI upwards of 50 times. (*Id.* at 137.)

Petitioner enter the CI's car, and was only able to see two individuals in the car he testified, over defense counsel's objection, that it was the Petitioner's voice.[7] (Trial Tr., 138, May 5, 2010.) The conversation between the Petitioner and the CI lasted approximately two to four minutes. The Petitioner then got out of the car, spoke to the CI for a short time, got back on his motorcycle and drove out of the Wendy's parking lot. (*Id.* at 139.)

After the transaction was finished, the CI drove back to a predesignated meeting place. Officer Strum followed him the entire way. (*Id.* at 140.) The CI handed the officer the body recorders, and a large gallon size Ziplock bag containing green vegetation. (*Id.* at 140.) The officer searched the CI and the CI's car again. He did not find the $300.00. (*Id.* at 141.) After filling out the necessary paperwork, he paid the CI $40.00 (*Id.* at 141.) The State then introduced a copy of the recording obtained from the CI's body wire. Before introducing this counsel for the State laid a foundation. He established that Officer Strum had been trained in the use of this equipment, that he had compared what was on the recording with what he had heard in real time, and that the recording had been downloaded to an audio recording computer. (*Id.* at 143-45.)

Over defense counsel's Sixth Amendment objection, the recording was received into evidence. (*Id.* at 147.) Officer Strum then identified the Petitioner as the person he saw get into the CI's car at the Wendy's parking lot. (*Id.*. at 147.) The officer testified that he did not know the Petitioner's name on the evening of the transaction, but obtained a copy of the Petitioner's picture which matched what the officer had seen during the transaction. (*Id.* at 148.) The Petitioner was

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[7]When asked, Officer Strum testified that he could make out that the individual who got off the motorcycle was a "white male." (Trial Tr., 138, May 5, 2010.) The parking lot was well lit, and the officer could see that the two individuals in the CI's car were carrying on a conversation. (*Id.* at 139.)

not arrested for another three months, and the Task Force never did recover the $300.00. (*Id.* at 148.)

On cross-examination defense counsel revealed that the CI had previously been convicted of two counts of breaking and entering and had served time in Huttonsville. (*Id.* at 156.) The CI also had an outstanding battery charge which was dismissed by the State. (*Id.* at 157.)

On re-direct, Officer Strum explained that effectuating an arrest on the evening of the transaction would have compromised other investigations involving the same CI. (*Id.* at 183-84.) The officer also testified that it was not uncommon for CI's involved in the controlled purchase of narcotics to have criminal backgrounds. (*Id.* at 186.) Some are directly compensated with cash; some are working off minor charges by assisting the police. (*Id.* at 180, 185.)

The State next called Deputy Justin DeWeese. (Trial Tr., 207, May 6, 2010.) Prior to his testimony, the trial court convened a suppression hearing. The day of the sale, Deputy DeWeese was working for the Parkersburg Violent Crime and Narcotics Task Force. (*Id.*) Officer Strum had trained him how to use the video equipment, which Deputy DeWeese had used thirty to forty times before the sale. (*Id.* at 209.) On the evening of the exchange he was approximately 130 to 150 yards away from both parties. (*Id.* at 210.) The State introduced a disk downloaded from the camera. Deputy DeWeese testified that he had seen the disk prior to trial, and that it had not been altered in any fashion, and that it accurately portrayed the events as they had occurred that evening. (*Id.* at 211.) He opined that both the Petitioner and the CI were depicted on the video. (*Id.* at 212.) Both sides stipulated that the audio portion of the videotape was unintelligible. (*Id.* at 216.) The trial court ruled that the video was admissible.

After the trial court recalled the jury Deputy DeWeese testified that he arrived at the Wendy's parking lot about 20 minutes before the CI. (Trial Tr., 220, May 6, 2010.) The camera was mounted outside of a surveillance van and was equipped with a zoom lens. The parking lot was well lit. (*Id.* at 225.) The deputy recorded the CI and the Petitioner for approximately eight or nine minutes. (*Id.*) Once Officer Strum and Deputy DeWeese had seen the disk, they placed it in the case file where it remained until trial. (*Id.* at 226.) Although he had not seen the Petitioner before the evening of the controlled buy, the deputy was able to identify him in court. (*Id.* at 228, 240.) The defense did not object to this identification. Once the transaction was completed, Deputy DeWeese met the CI and Officer Strum at a predesignated meeting place. Both he and another agent thoroughly searched the CI's car. They did not find anything. (*Id.* at 231-32.) The State then played both the audio and videotapes of the controlled buy for the jury. (*Id.* at 240-41.)

The State's next witness was Officer Robert Cox, formally of the Parkersburg Violent Crime and Narcotics Task Force. (*Id.* at 241.) The day of the buy, he met Officer Strum and the CI at approximately 10:18 p.m. (*Id.* at 243.) He then searched the CI's car. (*Id.* at 244.) Once he was finished, he followed Officer Strum and the CI to the Wendy's parking lot and parked in the same lot. (*Id.* at 246-47.) He observed the Petitioner drive onto the lot on a motorcycle, and get into the CI's car. He could not see what was going on inside the car.[8] (*Id.* at 247, 261.) Once the transaction was completed, Officer Cox followed Officer Strum and the CI to the predesignated meeting place. He and Officer Strum searched the CI's car. (*Id.* at 249.) He saw the CI carry a plastic bag with green vegetation. (*Id.* at 250.)

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[8]Officer Cox testified that he was approximately 100 yards from the CI's car. (*Id.* at 261.)

Counsel for the State then showed Officer Cox an envelope, which the officer identified as the envelope the officers received the crime lab containing the marijuana recovered from the CI. (Trial Tr., 253, May 6, 2010.) Upon opening the envelope, Officer Cox found a bag with marijuana. The officer recognized the envelope because he had written the case number on it before submitting it to the crime lab. (*Id.* at 254.) He then pulled the bag of marijuana out of the envelope. The officer was able to identify the bag because his initials were on the bag seal. (*Id.* at 255.) The bag also had the case number written on it.

Defense counsel argued that there was no evidence that the bag of marijuana offered as evidence by the State was the same marijuana sent by the investigating officers to the crime lab. (*Id.* at 257.) Counsel also argued that there was no evidence that the CI had handed this bag of marijuana to Officer Strum. (*Id.*) The trial court overruled defense counsel's objections. (*Id.* at 257-58.) Once he was given the marijuana, Officer Cox placed it in another bag labeled with the case number and the case agent. He then turned the bag into the crime lab. (*Id.* at 258.)

The State then called forensic drug chemist Farrah Machado. (*Id.* at 278.) Ms. Machado had worked approximately 3,000 cases prior to the Petitioner's case, 1,200 of those cases involved marijuana. (*Id.* at 279.) She had testified as an expert approximately 30 times. (*Id.* at 280.) The Court qualified her as an expert in chemistry and narcotics identification. (*Id.*) When the investigating officer dropped the marijuana off, it was placed in a vault in central evidence receiving. The only people with access to this vault are those employed in central evidence receiving and the lab director. (*Id.* at 281.) Once the evidence was transferred to Ms. Machado, she placed it in her evidence locker. No one but Ms. Machado had access to this locker. (*Id.* at 282.)

Ms. Machado tested the evidence on October 20 and 21. (*Id.* at 284.) She performed three tests: two involved examining the marijuana through a microscope, the third was a chemical color test. (*Id.*) Based on the results of each test, Ms. Machado opined that the substance was 50.8 grams[9] of marijuana. (*Id.* at 284-85.)

At the close of Ms. Machado's testimony the State rested its case-in-chief. (*Id.* at 288.) The defense moved for a judgment of acquittal arguing that the State had failed to satisfy its burden of proof because it had failed to produce the CI. Defense counsel also raised, for the first time, an entrapment defense citing *State ex. rel. Paxton v. Johnson*, 161 W. Va. 763, 245 S.E.2d 843 (1978). (Trial Tr., 289-90, May 6, 2010.) The trial court denied the Petitioner's motion. (*Id.* at 292.) Defense counsel then requested an instruction on entrapment. (*Id.* at 294.) The trial court refused to instruct the jury on entrapment finding that, pursuant to *State v. Houston*, 197 W. Va. 215, 475 S.E.2d 307 (1996), the defense had failed to offer any competent evidence that the government had induced the defendant into committing the offense. *See* Syl. pt. 4, State v. Houston.

The defense did not call any witnesses, or place anything into evidence. (Trial Tr., 298, May 6, 2010.) Upon instruction by the trial court and summation by both the State and the defense, the jury returned a guilty verdict on the sole count of the indictment.

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[9]An ounce is 28.35 grams.

V.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING BOTH THE AUDIO AND VIDEOTAPES OF THE DRUG TRANSACTION.

The Petitioner first claims that the trial court's decision to admit the video and audiotapes of the transaction between the CI and the Petitioner violated the Petitioner's Sixth Amendment right to confront the witnesses against him.

1. The Standard of Review.

The kernel of Petitioner's claim involves what effect, if any, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), had on this Court's decision in *State v. Dillion*, 191 W. Va. 648, 447 S.E.2d 583 (1994). (Petitioner's brief at 8.) Since this is an issue of law, the appropriate standard of review is *de novo*. "Where the issue on an appeal from the circuit court is clearly a question of law . . ., we apply a *de novo* standard of review." Syl. pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

But the Petitioner also seems to argue that the trial court's ruling on his motion to suppress the audio and video tapes was in error:

> In Syllabus Point 1 of *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996), we set out the standard of review of a circuit court's ruling on a motion to suppress as follows:
>
> > When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

State v. Sigler, 224 W. Va. 608, 615, 687 S.E.2d 391, 398 (2009).

The trial court chose to admit the audio and videotapes as evidence of the Petitioner's intent. This Court has repeatedly held, "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. pt. 2 *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (2011). *See also* Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

2. The Tapes Were Evidence of the Petitioner's Intent.

In *State v. Dillion, supra*, the trial court sentenced the defendant to two consecutive terms of one to five years for delivery of marijuana. The charges stemmed from two controlled buys set up by the Parkersburg Narcotics Task Force after they had received an anonymous tip that the defendant was selling drugs from a taxi he drove for a living. The task force used prostitute Sharon Godby as a confidential informant.[10] *Id.*, 191 W. Va. at 652, 447 S.E.2d at 587. She agreed to wear a body wire.

On the evening of the first buy the investigating officers searched Ms. Godby and then fitted her with the wire. That evening she recorded a conversation with the defendant confirming the terms of the deal. When they were finished talking the defendant drove off. The officers recorded another conversation between Ms. Godby and the defendant later that evening, but no drugs changed hands. Even later that evening the defendant met Ms. Godby for a third time in front of a bar in Parkersburg and handed her something. The investigating officers saw the exchange but could not make out what was in the defendant's hands. *Dillion,* 191 W. Va. at 653, 447 S.E.2d at 588. After

[10]In return for Ms. Godby's assistance, the task force managed to have outstanding prostitution charges dismissed. *Dillion*, 191 W. Va. at 652 n.3, 447 S.E.2d at 587 n.3.

the transaction, the investigating officers retrieved a plastic bag containing marijuana from Ms. Godby. *Id.*, 191 W. Va. at 653, 447 S.E.2d at 588.

The second time, Ms. Godby came to the task force and told them that she had set up another buy with the defendant. The investigating officers recorded a phone conversation between Ms. Godby and the defendant. The defendant agreed to sell Ms. Godby another ounce of marijuana for $330.00.[11] *Id.* Once again the investigating officers searched Ms. Godby, placed a body wire on her, and gave her the buy money. When the defendant did not show, the investigating officers instructed Ms. Godby to call him at his place of business. The officers later testified that they saw the defendant and a third party arrive in the defendant's cab. While Ms. Godby was in the cab she and the defendant discussed the proposed drug sale. She provided the defendant with the money, but did not get the drugs. The defendant, with the investigating officers close behind, drove home. He then drove back, once again with the officers close behind, to Ms. Godby. Once he arrived Ms. Godby got into the cab, and the two drove to the defendant's home.[12] During the ride, Ms. Godby recorded another conversation between the two regarding the transaction. After entering his apartment one more time, the defendant drove Ms. Godby back to the predesignated area. During this drive, Ms. Godby recorded further conversations regarding the transaction. The defendant left the area one more time and went to a bar. When he returned Ms. Godby got back into his cab. *Dillion*, 191 W. Va. at 654, 447 S.E.2d at 589. A short time later, Ms. Godby got out of the cab, went into the Subway ladies room. When she came out she gave the investigating officers a bag of marijuana. *Id.*

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[11]This included the defendant's brokering fee.

[12]By this time the third party was no longer present.

Prior to his arrest, the defendant gave a statement to the investigating officers admitting that he had sold these drugs to Ms. Godby. *Dillion*, 191 W. Va. at 654, 447 S.E.2d at 589. At trial, the defendant denied participating in these drug transactions, that Ms. Godby had asked him 10 or 11 times before if he could sell her marijuana--all of which he turned down, and that the State had entrapped him.

The State introduced a copy of the defendant's statement, a 1991 tape-recorded conversation between the defendant and Ms. Godby regarding a potential cocaine transaction,[13] and tapes recorded by Ms. Godby during both marijuana transactions. Ms. Godby appeared for the first day of trial but never testified. *Dillion*, 191 W. Va. at 655, 447 S.E.2d at 590.

The defendant claimed that the tapes violated State law regarding the surreptitious recording of conversations, contained hearsay, and that the tapes violated his rights under the Confrontation Clause. *Dillion*, 191 W. Va. at 655, 447 S.E.2d at 590. In this case, the Petitioner's assignment of error is limited to the alleged Confrontation Clause violation. Therefore, counsel for the Respondent will limit his reply to the Petitioner's only claim.

Prior to *Crawford*, this Court held that, "[t]he two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify, and (2) proving the reliability of the witnesses' out-of-court statement." *State v. James Edward S.*, 184 W. Va. 408, 480 S.E.2d 843 (1990), *overruled by* Syl. pt. 7, *State v. Mechling,* 219 W. Va. 366, 368, 633 S.E.2d 311, 313 (2006).

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[13]This evidence was introduced to rebut the defendant's entrapment defense by demonstrating predisposition. *Dillion*, 191 W. Va. at 655, 447 S.E.2d at 590.

In *Mechling* this Court adopted the Supreme Court's holding in *Crawford,* stating

> Pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Syl. pt. 6, *Mechling* 219 W. Va. at 368, 633 S.E.2d at 313.

It is the Petitioner's position that both *Crawford* and *Mechling,* by overruling *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), implicitly overruled this Court's holding in *Dillion* that tape-recorded conversations between a CI, who does not appear for trial, and a defendant may be admissible under the Confrontation Clause. The Petitioner is wrong. In *Dillion* this Court ruled that the Confrontation Clause bars the admission of hearsay evidence under the residual hearsay exceptions contained in West Virginia Rules of Evidence. 803(24) and 804(b)(5) unless the proponent can make a specific showing of particularized guarantees of trustworthiness. Such statements, admitted pursuant to *James Edward S.*, are admitted for the truth of the matter asserted.

In this case, the CI's recorded statements[14] were not admitted for the truth of the matter asserted. For purposes of Petitioner's case, whether the CI was being honest when he told the Petitioner that he wanted to buy marijuana from him was not at issue. The record leaves no doubt that the CI was lying. There was no "meeting of the minds" here, nor did there have to be in order to consummate the offense. The Petitioner's guilt was not proven by the CI's willingness to purchase the drugs, which was nothing but an act, but by his intent to sell them. In a sound exercise

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[14]Clearly, the Petitioner's own recorded statements were admissible against him. *See* W. Va. R. Evid. 801(d)(2)(a) (a statement is not hearsay if it is offered against a party and is party's own statement).

of its discretion, the trial court ruled that the tapes were evidence of this sale. As the trial court ruled, "And I guess my concern is whether *Crawford* is even proper analysis, because what [the tape] is is essentially original evidence of the crime." (Trial Tr., 115-16, May 5, 2010.) *See Dillion,* 191 W. Va. at 658, 447 S.E.2d at 593 (statements not introduced for the truth of the matter are admissible hearsay). *See also* W. Va. R. Evid. 801(c) (an out-of-court statement not introduced for the truth of the matter asserted is admissible). To the extent *Dillion* relies upon this rule it is still good law; neither *Crawford* nor *Mechling* are relevant. *See Crawford,* 541 U.S. at 42 ("the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted."); *State v. Morris*, 227 W. Va. 76, 705 S.E.2d 583 (2010) (out-of-court statements not introduced for the truth of the matter asserted do not run afoul of the Confrontation Clause) (quoting *Crawford,* 541 U.S. at 59 n.9.)

B. THERE WAS NO EVIDENCE OF ENTRAPMENT.

The Petitioner next claims that the trial court should have granted his Motion for a Judgment of Acquittal at the close of the State's case because the record reveals "overwhelming evidence of entrapment."

1. <u>Standard of Review</u>.

"Upon review of a trial court's refusal to enter a judgment of acquittal based on the defense of entrapment, we will examine the evidence in the light most favorable to the prosecution, and will reverse only if no rational trier of fact could have found predisposition to exist beyond a reasonable doubt." Syl. pt. 6, *State v. Houston,* 197 W. Va. at 218, 475 S.E.2d at 310.

2. The Petitioner's Entrapment Defense Has No Merit, Nor Did the Trial Court Abuse its Discretion by Refusing to Instruct the Jury on the Defense.

This Court has ruled:

> When the defendant invokes entrapment as a defense to the commission of a crime, the defendant has the burden of offering some competent evidence that the government induced the defendant into committing that crime. Once the defendant has met this burden of offering some competent evidence of inducement, the burden of proof then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense.

State v. Houston, 197 W. Va. 215, 218, 475 S.E.2d 307, 310 (1996).

In *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992), the Supreme Court held, "Where the Government has induced an individual to break the law, and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." A defendant who claims that he was entrapped opens himself to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells v. United States*, 287 U.S. 435, 451 (1932). Thus, predisposition may be shown by evidence of other crimes that might not otherwise be admissible. Although there are no rules requiring a defendant to reveal his intent to rely on entrapment before trial, Rule 32.02(b) of the West Virginia Trial Court Rules appears to take it for granted:

> In addition to the requirements of Rule 404(b), if, during the discovery conference or thereafter, the attorney for the defendant advises the attorney for the State that the defense is one of entrapment. . ., the attorney for the State shall, within five (5) days or two (2) weeks prior to trial, whichever is later, disclose a synopsis of any other crimes, wrongs, or acts about which the State has information and which is relevant to said defense and intended for use by the State in its case in chief or rebuttal.

The Petitioner claims that there was overwhelming evidence of entrapment. If this were true, which it is not, it is because of the way in which the defense raised the issue. Because counsel for the defense waited until after the State had rested to assert his entrapment defense, the State was never afforded an opportunity to prove predisposition. "The defendant's lack of predisposition is the *crux of the entrapment defense*." *United States v. Fadel*, 844 F.2d 1425 (10th Cir. 1988) (citing *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (emphasis added)). There was no "appropriate and searching inquiry" into the Petitioner's previous conduct because his attorney raised the issue for the first time in a motion for a judgment of acquittal. The defense then chose not to call any witnesses.

There was no overwhelming evidence of entrapment. Entrapment requires proof of two elements: (1) government agents must have induced the defendant to commit the offense, and (2) the defendant must not have been otherwise predisposed to commit the offense, given the opportunity. *Matthews v. United States,* 485 U.S. 58, 62 (1988). Defense counsel's procedural parlor games effectively muzzled the State.[15] The Petitioner now steps back and claims that the State failed to rebut a defense never raised at trial, after their opportunity to do so had passed.

Nor did the Petitioner produce "some competent evidence that the government induced the defendant into committing the crime." Syl. pt. 4, *State v. Houston*. The mere fact that the State initiated the controlled buy does not satisfy the Petitioner's burden of proof. There was no evidence that the Petitioner was in any way surprised by the CI's request to purchase the drugs or that the Petitioner was hesitant to sell them. The State merely provided the opportunity, it did not pester,

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[15]Had the State tried to introduce evidence of prior bad acts, defense counsel would have objected under West Virginia Rule of Evidence 404(b).

force or coerce the Petitioner into taking it. *See State v. Basham*, 159 W. Va. 404, 412, 223 S.E.2d 53, 58 (1976) ("[I]t is perfectly proper for police officers to afford opportunities for the commission of a crime without prejudicing the subsequent prosecution of the person who commits the offense.").

The Petitioner also claims that the trial court erred by not instructing the jury on entrapment. A trial court need not instruct a jury on the elements of an affirmative defense not proven at trial. "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence." Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 663-64, 461 S.E.2d 163, 169-70 (1995). Given the manner in which defense counsel raised the issue, and the lack of evidence of inducement, the trial court's decision was a sound exercise of its discretion. "As a general rule, the refusal to give a requested jury instruction is reviewed for abuse of discretion." Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 281, 489 S.E.2d 257, 258 (1996).

C. OFFICER STRUM'S AND DEPUTY DEWEESE'S OPINION TESTIMONY WAS ADMISSIBLE.

The Petitioner next argues that the trial court should not have allowed Officer Strum and Deputy DeWeese to opine that one of the voices on the audiotape was the Petitioner's.

1. Standard of Review.

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the Appellate Court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 10, *State v. Huffman*, 141 W. Va. 55, 57, 87 S.E.2d 541, 544 (1955) *overruled on other grounds State ex. rel. v. Bedell,* 192 W. Va. 435, 437, 452 S.E.2d 893, 897 (1994).

2. The Identification Testimony was Admissible as Lay Opinion Evidence.

During the pretrial suppression hearing the following exchange between Officer Strum and Counsel for the State took place:

Q: Now, the person that was in the automobile that you heard, did you – well, first off, have you listened to the recordings prior to today's hearing?

A: Yes, I have sir.

Q: And did you recognize any of the voices on the recordings?

A: I recognized the voice of our confidential informant for sure, yes sir.

Q: Now, when the confidential informant got in the automobile, were there any other individuals in the car with him?

A: No, sir.

Q: And when he drove to the site of – to Wendy's were there any other individuals in the car with him?

A: No, sir.

Q: At any point did anybody, other than the defendant, get in the car with the confidential informant?

A: No, sir.

Q: All right. Did you hear a second voice on that audio recording?

A: Correct, sir.

Q: And who did you conclude, based on your observations, that the voice belonged to?

A: It would be the defendant, Mr. Waldron.

(Trial Tr., 10-11, May 5, 2010.)

Officer Strum had previously testified that he had searched the CI's car before the CI drove to Wendy's, placed the wire on the CI before he got back in the car, and followed the CI to Wendy's. (*Id.* at 7.) The officer was trained to operate the wire he placed on the CI, and the recording device was in proper working order. (*Id.*) Once the recording was made, it was taken into custody by Officer, and downloaded to a disk. (*Id.* at 13.)

Officer Strum had not met the Petitioner prior to the controlled buy. He only knew him as "Tim." (*Id.* at 23.) He did not establish the Petitioner's identity until he compared his picture on the video tape with a picture taken by a parole officer. (*Id.* at 23, 28.) Officer Strum waited a few months before arresting the Petitioner, in order to preserve the confidentiality of the CI's identity. (*Id.* at 26.)

It was Officer Strum who effectuated the Petitioner's arrest on August 28, 2009. (*Id.*) After the controlled buy, Officer Strum discovered that the Petitioner was living in the Homecrest Apartments with his girlfriend. (*Id.* at 29.) Prior to arresting the Petitioner, Officer Strum spoke with him. When the Petitioner advised the officer that he no longer wished to speak with him, the officer placed him under arrest. (*Id.* at 26-27.)

At trial Officer Strum testified that the Petitioner entered the CI's car in the Wendy's parking lot. Officer Strum could identify the sound of the CI's voice from pre-transaction interactions. (*Id.*. at 137.) Once the Petitioner got into the CI's car, Officer Strum could hear a second voice. Over the defense's objection, he opined that the second voice belonged to the Petitioner. (*Id.* at 138.) When the Petitioner took off his motorcycle helmet, Officer Strum could make out his face. Because of the nature of the recording device, Officer Strum was able to listen in on the conversation between the CI and the Petitioner at the time of the transaction. He testified that the disk was an

accurate representation of that conversation. He also testified that he had listened to the recording prior to his testimony. (*Id.* at 145.)

The State moved for the admission of the audio recordings. Defense counsel objected on hearsay and Confrontation Clause grounds. The trial court overruled the defense's objection, and admitted the disk into evidence. (*Id.* at 146-47.) Officer Strum also made an in-court identification. Defense counsel did not object. (*Id.* at 147.) The officer testified that he was the arresting officer. He placed the Petitioner in handcuffs and took him to magistrate court for his initial appearance. (*Id.* at 175.)

Pursuant to West Virginia Rule of Evidence 901(b)(5) identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording [may be made] by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. "Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either *before or after* the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting." Fed. R. Evid. 901(b)(5) § Example 5 (emphasis added.) Whether the officer identifies the defendant's recorded voice based upon a conversation he had with him after the event in question is irrelevant. A witness offering a lay voice identification opinion need not base this opinion solely upon information gathered during, or prior to, the criminal act. *McGuire v. State,* 92 A.2d 582 (Md. 1952). It is the witness's competency at trial which is at issue.

In this case, Officer Strum was the arresting officer. At the suppression hearing he testified that he spoke with the Petitioner just before he arrested him. Therefore, he was familiar with the Petitioner's voice before he testified. The trial court judge admitted Officer Strum's voice

identification testimony because, *inter alia*, he reasonably found that a reasonable juror could find that the Petitioner's voice had been identified in the recorded conversations. *See* W. Va. R. Evid. 701 (lay opinion testimony admissible if it is rationally based on perception of witness). The burden of the proponent of this testimony is not high. The witness need only be better situated than the jurors for his identification testimony to be admissible. *See United States v. Cruz-Rea,* 626 F.3d 929 (7th Cir. 2010) ("We have consistently interpreted [901(b)(5)] to require that the witness have only minimum familiarity with the voice.") (internal citation omitted); *see also* W. Va. R. Evid. 901(b)(5) (witness may make voice identification if he previously heard voice "at any time under circumstances connecting it with the alleged speaker."). The Petitioner's objections go to the weight of Officer Strum's opinion, not its admissibility. As the trial court stated, defense counsel had every opportunity to cast doubt upon the officer's testimony during cross-examination. (Trial Tr., 138, May 5, 2010.)

In addition to his firsthand experience with the Petitioner, there was an abundance of circumstantial evidence to support his testimony. "It is ultimately the trier of fact's responsibility to determine the accuracy and reliability of the identification testimony, and when reaching its determination, the trier of fact may consider circumstantial evidence that tends to corroborate or contradict the identification." *Cruz-Rea*, 626 F.3d at 935.

Officer Strum testified that he searched the CI's car before he got in, followed him to the drop area, observed him while he was parked at the drop area, saw the Petitioner arrive and get into the CI's car, once he entered the car the officer heard a second voice. The recording equipment was working, and the officer had been trained to properly operate it. There was no evidence that anyone but the Petitioner got into the CI's car either before, during or after the transaction. Once the

transaction was complete Officer Strum followed the CI to a predesignated meeting area, searched the car again, and accepted the bag of marijuana from the CI.

Prior to Deputy DeWeese's testimony, the trial court convened another suppression hearing on the videotape. Deputy DeWeese testified that he videotaped the transaction between the CI and the Petitioner from approximately 130 to 150 yards. (Trial Tr., 210, May 6, 2010.) The surveillance camera was fitted with a zoom lens. (*Id.* at 225.) Deputy DeWeese had been trained on how to operate the surveillance camera, and had previously operated it about 40 times. The camera was in full working order. (*Id.* at 209.) He opined that the Petitioner was depicted on the video tape taken the evening of the controlled buy. (*Id.* at 212.) The Petitioner did not object to this in-court identification. He produced a disk taken from the camera, and testified that he and Officer Strum had looked at it before trial. It was then placed in the case file where it remained until the day of trial. (*Id.* at 212.) The deputy did look at the disk two more times before trial. (*Id.* at 226.) The tape accurately depicted the controlled buy. (*Id.* at 212.) Both sides stipulated that the audio portion of the video tape was incomprehensible. (*Id.* at 217.) Thus, the tape was muted when it was shown to the jury.

At trial, Deputy DeWeese testified that the disk had not been altered in any fashion. (*Id.* at 227.) He conceded that he had never met the Petitioner prior to the evening of the controlled buy, but was able to make an in-court identification. (*Id.* at 227-28.) Deputy DeWeese testified that he did not know the Petitioner, and did not see any drugs change hands. (*Id.* at 234.) Subsequent to the Petitioner's arrest, Deputy DeWeese was told that the Petitioner's name was Timothy Waldron. (*Id.* at 239.)

Once again the Deputy's testimony was lay witness opinion. Ordinarily, a lay witness is not permitted to give opinion testimony about a matter in dispute because the jury and lay witnesses are ordinarily in equal positions to reach an accurate opinion about the matter. *See State v. Winstone*, 959 S.W.2d 874, 877 (Mo. App. E.D. 1997). But a lay witness is permitted to give an opinion about a disputed matter when the lay witnesses' opinion is based upon knowledge not available to the jury and would be helpful to the jury in reaching its opinion. *State v. Jefferson*, No. SD-30600, 2011 WL 1812804, at * 5 (Mo. App .S.D., May 12, 2011).

In this case, Deputy DeWeese was present at the scene of the controlled buy when it took place. He videotaped the buy, and reviewed the tape several times before testifying. He also had access to the case file. It is not as if the deputy was looking at the tape for the first time when he sat down to testify, or was not present to view the transaction take place. *See* e.g., *State v. Harris*, 216 W. Va. 237, 605 S.E.2d 809 (2004) (*per curiam*). His testimony was clearly admissible.

Even if this Court were to find that the inclusion of Deputy DeWeese's identification testimony was an abuse of discretion, the error is harmless:

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. pt 2, *State v. Atkins,* 163 W. Va. 502, 261 S.E.2d 55 (1979).

Deputy DeWeese's testimony mirrored Officer Strum's testimony. Therefore, it was merely cumulative. If this Court were to strip the deputy's identification testimony from the record, it would make little or no difference. The remaining evidence, although circumstantial, is

overwhelming. The Petitioner set up a drug deal at a local Wendy's. He was seen going into the parking lot. The CI did not possess any drugs or contraband before the Petitioner entered her car. When he left she had almost two ounces of marijuana, and the buy money given to her by the police was gone. The jury both saw and heard evidence corroborating the sale. A forensic chemist testified that the material in the bag taken from the CI was marijuana. There is no doubt that the Petitioner arranged the sale, and consummated it.

D. THE STATE PROPERLY AUTHENTICATED THE MARIJUANA.

The Petitioner next claims that the State never proved that the marijuana they received from the CI was the same marijuana sold to him by the Petitioner.

1. Standard of Review.

"The preliminary issue of whether a sufficient chain of custody has been shown to permit the admission of physical evidence is for the trial court to resolve. Absent abuse of discretion, that decision will not be disturbed on appeal." Syl. pt. 2, *State v. Davis*, 164 W. Va. 783, 784, 266 S.E.2d 909, 910 (1980).

2. The State Introduced Sufficient Testimony of the "Chain of Custody."

Before a physical object connected with a crime may properly be admitted into evidence, it must be shown that the object is in substantially the same condition as when the crime was committed. Factors to be considered in making this determination are: (1) the nature of the article, (2) the circumstances surrounding its preservation and custody, and (3) the likelihood of intermeddlers tampering with it. *State v. Davis* 164 W. Va. at 784, 266 S.E.2d at 910.

The Petitioner does not claim that the evidence was tampered with: He claims that there is no evidence connecting him to the marijuana. The Petitioner is wrong. The evidence supporting

the State's conviction has been repeated over and over. The CI did not have marijuana when she pulled into the Wendy's parking lot. The Petitioner arrived, got into his car, and spoke with him for a few minutes. When the investigating officers searched the CI again, he had two ounces of marijuana. This evidence did not magically appear from the ether.

This Court has repeatedly held, "[t]he weight of circumstantial evidence, as in the case of direct evidence, is a question for jury determination, and whether such evidence excludes to a moral certainty, every reasonable hypothesis, other than that of guilt is a question for the jury." Syl. pt. 4, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967).

In this case the State introduced evidence that the CI did not have marijuana before she met the Petitioner, but did have $300.00. After she met the Petitioner she had almost two ounces of marijuana, but did not have the $300.00. The Petitioner was the only person to get into her car while she was being watched at the Wendy's parking lot. The purpose of the meeting was the sale of marijuana. Once the State recovered the marijuana Officer Strum searched the CI again. (Trial Tr., 141, May 5, 2010.) He then completed a statement of activity. (*Id.*) Once the CI signed the proper paperwork, Officer Strum paid him $40.00. (*Id.* at 143.) He then placed the marijuana into evidence, filled out a CIB card which is used to send the marijuana to the crime lab, and also filled out an evidence sticker to put on the bag of marijuana. The officer then placed the bag into the task force's evidence locker. (*Id.* at 188.)

Officer Cox testified that he received a manilla envelope containing the bag of marijuana. (Trial Tr., 253, May 6, 2010.) The envelope had the case number written on front in Officer Cox's handwriting. (*Id.* at 254.) He also placed his initials on the bag seal. Once they had recovered the

bag from the CI the officers signed it, put the case number on it, and documented where it was recovered and who it was from. (*Id.* at 256.)

State forensic drug chemist Farrah Machado testified that she picked up the bag of marijuana from Central Evidence. (Trial Tr., 281, May 6, 2010.) Central Evidence receives evidence from the officer in a sealed condition. They store it temporarily in a vault which can only be accessed by a Central Evidence employee, or the lab director. (*Id.*) Once she picked up the bag, Ms. Machado wrote the case number, the item number, and her initials. (*Id.*) While she was not testing the bag's contents it remained in her own evidence locker. (*Id.* at 282.)

It is clear from the above that the State introduced sufficient evidence to establish an appropriate chain of custody. Every witness was able to identify the evidence because of contemporaneous markings such as signatures, or case numbers. Although none saw the marijuana change hands, this is a matter of weight, not admissibility. Syl. pt. 2, *State v. Bailey*, *supra* ("The jury is the trier of facts and in performing that duty it is the sole judge as to the weight of evidence and the credibility of the witness.").

E. THE STATE COMPLIED WITH THE DICTATES OF *BRADY.*

The Petitioner next claims that the State failed to turn over photographs "and other information" used to identify the Petitioner as the person who sold the drugs to the CI.

1. Standard of Review.

"A claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and question of law are subject to *de novo* review." Syl. pt. 7, *State v. Black*, ___ W. Va. ___ 708 S.E.2d 491, 495 (2010).

2. The Petitioner Has Not Proven the Photographs Were Material Evidence.

A *Brady* violation has occurred if: (1) the government willfully or inadvertently suppressed; (2) evidence favorable to the accused; and (3) prejudice ensued. *Strickler v. Green*, 527 U.S. 263, 281-82 (1999). To make out a violation, the withheld evidence must be material. Evidence is material for *Brady* purposes if there is a reasonable probability that the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The State turned over both the audio and video tapes of the transaction. The CI told the officers that "Tim" lived with his girlfriend in an apartment at Homecrest Manor. (Trial Tr., 25, 27, May 5, 2010.) The arresting officer identified the Petitioner by listening to him tell the CI that he was on parole. Officer Strum then called the parole board and found out that a parolee named Tim Waldron lived with his girlfriend in an apartment at Homecrest. (*Id.* at 27.) The Parole Board sent Officer Strum a copy of the Petitioner's picture. By comparing still photographs from the videotape with this photo the officer was able to identify the Petitioner. (*Id.* at 24, 29.)

The record suggests that defense counsel made this argument as an afterthought. (*Id.* at 121.) The Court held that, under Rule 16 of the West Virginia Rules of Criminal Procedure, the State is only required to turn over tangible objects it intends to use as evidence.[16] The picture from the parole board was never introduced at trial. The stills from the video were turned over when the State turned the video over. (*Id.* at 121-22.) Therefore, the jury did not base its findings on the picture from the parole board; instead, they viewed the video and listened to the audio, and considered the

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[16]Rule 16(C) requires the State to make available tangible objects, such as photographs, which are in its custody and control, which are material to the defense's preparation, or are intended to be used by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

corroborating evidence pointing to the Petitioner. The photo taken from the parole board was not material under *Brady*.

VI.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Wood County should be affirmed by this Honorable Court.

Respectfully submitted,

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Plaintiff Below, Respondent,

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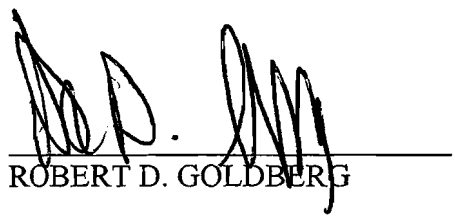
CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "Response to Petition for Appeal" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 13th day of June, 2011, addressed as follows:

To: Courtney L. Ahlborn, Esq.
3301 Dudley Avenue
Parkersburg, WV 26104



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